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In The

Supreme Court of the United States

October Term, 1995

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,

Petitioner,

v.

J. JACK BRAS, INDIVIDUALLY AND DOING BUSINESS AS J. JACK BRAS & ASSOCIATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF ON BEHALF OF PETITIONER THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

To The Honorable William H. Rehnquist, Chief Justice of the Supreme Court of the United States:

Statement of Interest[1]

AT & T Corporation ("AT&T"), Pacific Gas and Electric Company ("PG&E"), and Southern California Edison Company ("Edison") (collectively "Utilities") are among the largest public utilities in California. AT&T is a long distance carrier, PG&E is a combined power and energy company, and Edison is a power company. All of the Utilities are subject to the Public Utilities Commission's General Order 156, the regulation at issue. Under that regulation, the Utilities together purchase over $375 million worth of goods and services annually from minority, disabled veteran and women-owned business enterprises in California.

The Utilities believe that increasing diversity in their supplier relationships is a corporate imperative. The California Legislature has also declared that encouraging and

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[1] Supreme Court Rule 37.2(b) provides that a motion for leave to file an *amicus curiae* brief may be presented to the Court as one document with the brief sought to be filed when a party to the case has withheld consent. Petitioner, the Public Utilities Commission of the State of California, has given written consent. See CPUC Letter included with this filing. Respondent J. Jack Bras has withheld consent to this filing. Accordingly, AT&T, PG&E and Edison respectfully submit this motion and brief.

developing the capacity of women, minority and disabled veteran business enterprises is vital to the well-being of California's economy. Cal. Pub. Util. Code § 8281(a). The California Public Utilities Commission (the "Commission") through its General Order 156 provides clear guidelines and objectives which help the Utilities achieve their goal, and the state to achieve its. The Utilities therefore have a strong interest in preserving the vitality of General Order 156.

The Ninth Circuit's decision puts General Order 156 under a cloud it does not deserve. The decision states that the regulation has the "practical effect" of requiring discriminatory programs. The Utilities, which operate under the regulation, are clear that it does not. They understand that they are free under the Order to design and implement their own programs. A state may legally encourage businesses to increase their commitment to diversity. That is all General Order 156 does.

However, the Ninth Circuit's decision opens the door to attacks on the regulation by persons (like Mr. Bras) who are unable to show that it has, or ever will, hurt them. Leveling the playing field for all is a vitally important goal of the Utilities, the state and the country. General Order 156 advances this goal without requiring or even encouraging discrimination. But even if the regulation encouraged the adoption of discriminatory programs, this Court's decisions make clear that those programs would have to be subjected to a searching review. That review should not, and cannot, be performed in the abstract, and that is the result the Ninth Circuit's decision would force.

For these reasons, the Utilities respectfully request leave of Court to file this *amici curiae* brief in support of the Commission.

DATED: December 14, 1995.

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By: _____

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I. INTRODUCTION

This case is literally unprecedented.

The California Public Utilities Commission ("Commission") required utilities to submit plans, including goals, in respect to purchases from women and minority vendors. The goals were to be "targets," not "quotas," "requirements" or set asides. Each utility was free to fashion its plan as it wished. One fashioned a process unique to it that, among other things, assigned a 10-point bonus to minority and women bidders on a single bid for architectural services. A white male architect bid to provide services to that utility, but was turned down. He sued the Commission, some of its officers and the utility, alleging that the utility's implementation of its bonus scheme caused him to be turned down, and so injured him.

After suit was filed, the architect settled with the utility, dismissed it from the suit, and completely redressed whatever injury he ever had. The architect has not been injured by any other utility and has never sought to work for one. Nonetheless, the architect continued suit against the Commission and attacked the Commission's Order in the abstract.

The Ninth Circuit ruled the architect had standing to make that attack. If allowed to stand, that ruling authorizes any plaintiff, any time, anywhere, to attack any governmental agency's general policy encouraging private parties to adopt affirmative action policies of their own, notwithstanding that (a) the government's policy has not and cannot possibly cause plaintiff any injury; (b) only private action can cause injury; and (c) the only private actor who ever arguably injured plaintiff or, he imagines, ever might, is not before the Court, and, in the case before the Court, never will be.

"A carefully designed affirmative action program" may help realize the Fourteenth Amendment's promise. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2134, 2136 (1995) (Ginsburg, J., dissenting, but writing to "underscore . . . the considerable field of agreement . . . revealed in opinions that together speak for a majority of the Court.") A court must undertake a "searching," "close review" to determine whether a carefully designed plan has that benign, or instead, a malign effect. *Id.* at 2136. Under the Ninth Circuit's decision, an uninjured plaintiff can force a court to undertake that searching review, not with regard to a carefully designed plan, but in the abstract and without regard to any plan. Thus, the decision opens to abstract attack every WMBE plan of every utility – indeed, of every buyer of goods and services – although the plan has injured no one. It also opens to abstract attack every statute, ordinance and governmental order regarding the purchase of WMBE goods and services, although there is no plan implementing the statute, ordinance or order, and no one has been hurt at all.

Therefore, upon this most sensitive, difficult issue, the Ninth Circuit's decision opens the litigation floodgates, and sanctions exactly what two centuries of standing law and Article III of the Constitution are meant to prevent. No case has ever sanctioned anything like it before. As utilities subject to the Commission's jurisdiction and fully supportive of its women and minority procurement goals, we urge review.

II. STATEMENT OF FACTS

The facts are these. They are taken in large part from the Ninth Circuit's and trial court's recitation.

A. The Code And The General Order

In 1986, the California State Legislature enacted the "Women and Minority Business Enterprises" ("WMBE") Law, codified as sections 8281-8286 of the California Public Utilities Code ("Code"). The Legislature declared that "the essence of the American economic system of private enterprise is free competition;" that competition is "basic to the economic well-being of this state;" and that that "well-being cannot be realized unless the actual and potential capacity" of WMBEs "is encouraged and developed." Pub. Util. Code § 8281(a). Accordingly, the purpose of the WMBE law is, among other things, "to encourage greater opportunity" for WMBEs and so "promote competition" among utility suppliers. Pub. Util. Code § 8281(b)(2). To those ends, the law empowers the Commission to "require each electrical, gas and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) . . . to submit annually, a detailed and verifiable plan for increasing women, minority, and disabled veteran business enterprise procurement in all categories." Pub. Util. Code § 8283(a).

Pursuant to Section 8283(c), the Commission promulgated and implemented General Order 156 (the "General Order"). Section 8 of the General Order calls on each utility to set "substantial and verifiable short-term (one year), mid-term (three years), and long-term (five years) goals for the utilization of WMBE's." Section 8.2 provides that "[e]ach utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises

and not less than 5% for women owned business enterprises." A "goal" is a "target which when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota." Gen. Ord. § 1.3.13.

The Commission has advised this Court that "it does not prescribe any particular method or means by which utilities must pursue these goals. Each utility is free to design its own . . . program" according to its "particular requirements and needs," and "to use its judgment" to determine the "means" to achieve its goals. Pet., p. 3. *Amici* understand the General Order and the Commission's practice as it has represented it. Indeed, each *amicus* has voluntarily designed and implemented its own program, using its judgment.

Our programs were not before the lower courts, and we do not mean to intrude them into the record before this Court. That would be improper, and beside our point: The Ninth Circuit's ruling allows an attack upon the Commission's General Order, in the abstract. As a result, our voluntary programs promoting unquestionably lawful outreach efforts to increase procurement from women and minorities are subject to serious but unnecessary challenge.

B. Pacific Bell's Program and Past Acts

Pacific Bell, a utility subject to the Commission's jurisdiction, designed and adopted a WMBE plan for itself, applicable to vendors to it. One of its bids called for vendors interested in doing business with Pacific Bell to respond to a questionnaire. Question 10 of the questionnaire asked, "[A]re you currently certified through the Cordoba Corporation Clearing House process for Minority/Women Business Enterprise status?" Petition Appendix ("App.") 94-96.

Pacific Bell assigned numbers to each respondent's answers, added the numbers up, and so ranked the respondents according to their scores. The total possible points was 95. A "yes" answer to Question 10 was worth 10 points, and a "no" answer zero. App. 46.

J. Jack Bras is a white male architect who had provided architectural services to Pacific Bell from 1969-1991. In 1991 Pacific Bell wrote Bras and other architectural firms, explaining that it intended to limit the number of its business relationships, and asking that architects interested in working for it fill out the questionnaire. Bras responded, and answered Question 10 no, for zero points.

Thirteen architectural firms responded, and Pacific Bell rank ordered them, by the numbers, in accordance with its bidding scheme. Bras ranked sixth, and Pacific Bell negotiated with the top three only. Pacific Bell's representative, Mr. Behuresht, said that Bras would have ranked third numerically if Question 10 had not been considered. Behuresht also explained that Pacific Bell did not select entirely on mathematical rankings, but only used them to determine the firms to negotiate with. Behuresht Deposition, App. 103-105.

Pacific Bell's process for selecting architects was unique; no one has claimed or could claim that any other utility's program was anything like it. Also, Bras' experience with Pacific Bell was unique to it. He did not claim he had ever worked or applied to work for any other utility, or ever planned to.

C. The Settlement And Dismissal

On January 10, 1992, Bras brought an action pursuant to 42 U.S.C. §§ 1981, 1983 and 1985 against Pacific Bell

and the Commission and two of its officers.[2] He alleged that Pacific Bell's program and the implementation of it discriminated against him on the basis of race and sex and violated his rights under the Fourteenth Amendment's Equal Protection Clause. Bras sought damages for that alleged injury. He also charged that California Public Utilities Code §§ 8281-8286 and the Commission's General Order 156 were unconstitutional and should be declared void on their face. He further sought a permanent injunction forbidding the Commission from implementing the Order.

During the pendency of the District Court proceedings, Bras settled all claims with Pacific Bell and dismissed it from the case. Bras represented to the District Court that 50% of the settlement money compensated him for economic damages (i.e., lost business from Pacific Bell) and 50% compensated him for noneconomic damages. *Bras v. California Public Utilities Commission*, No. CV-92-0304-WHO, slip op. at 9 (N.D. Cal. March 17, 1993) ("*Bras I*").

Accordingly, Bras had no grievance left with Pacific Bell, and no future grievance on any horizon. He could not apply to perform services for Pacific Bell for three years, when the three-year terms of the agreements it executed under its program expired. There was no evidence in the record as to what Pacific Bell's program, if any, would look like when the three years were up, or, for that matter, whether its program is the same today as when Bras filed his application under it.

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[2] Philip Bremond was named in his representative capacity as WMBE Program Manager for the Commission. Neal Shulman was named in his capacity as the former Executive Director of the Commission. The Commission, Bremond and Shulman are collectively referred to as "Commission."

Of course, Bras has no past, present or future grievance with any other utility, never having worked for any and having no plans to.

D. The Remaining Parties, And The District Court's And Ninth Circuit's Rulings

Bras dismissed the utility that allegedly violated his rights. His only remaining claims were for declaratory and injunctive relief against the Commission. The Commission, however, had not adopted Pacific Bell's program, nor turned down Bras under it. Accordingly, having been compensated for the injury he allegedly suffered, he attacked the Commission's General Order facially only.

The District Court held Bras had no standing to wage that abstract attack. It reasoned that "Bras might be able to argue (although it is by no means likely that he would have succeeded) that the WMBE and the General Order prevented him from obtaining future business with Pacific Bell. Plaintiff's settlement, however, extinguished all of his claims with respect to Pacific Bell." *Bras I*, App. 39, (original underscoring). The District Court further found that Bras had not presented a "shred" of evidence that Pacific Bell would not have reduced the number of architectural firms it used in the absence of the WMBE and the General Order, *Bras I*, App. 41, nor that Pacific Bell "would reevaluate its decision not to retain . . . [Bras] for future business were the WMBE nullified." *Id.* Moreover, Bras' only "legal complaint" against Pacific Bell was that it should not have considered his WMBE status in its application process, and his settlement "effectively extinguished" that complaint. Therefore, and necessarily, Bras' complaint "that the WMBE and the General Order interfered with his business opportunities" is likewise extinct.

The Ninth Circuit reversed, concluding that Bras had standing to complain anyway. *Bras v. California Public Utilities Commission*, 59 F.3d 869 (9th Cir. 1995) ("*Bras II*"). Indeed, the Ninth Circuit looked to the merits upon this standing case. Thus it found that, while the Code and Order "do not expressly state that public utilities must adopt any particular programs such as bidding preferences or set asides, they clearly have the practical effect of requiring them to do so." *Bras II* at 875. It also found that the Code and Order "effectively encourage, if not compel, Pacific Bell to adopt discriminatory programs . . . . " *Id.* There is no basis for the conclusions and they are in fact incorrect.

First, as the dissent pointed out, there was no evidence whatever to support them. Moreover, although the findings speak to the General Order's practical effect on the utilities, no utility was before the Court. Pacific Bell was dismissed from the case, and no other utility was ever a party to it. These *amici* utilities find the Court's findings as to the Order's effect on them baffling and contrary to fact. The Code and Order do not encourage, much less require, that they adopt "set asides" or "discriminatory programs."

One uninjured by a program ought not be empowered to force a Court to undertake the "searching review" necessary to "ferret" out the program's effect; after all, a program that has not injured him has no effect on him. Surely a court cannot conclude that an Order forces utilities to commit discriminatory acts in the absence of any claim pending against any utility supposedly forced to commit them. That is particularly so since the purpose of the Order is to foster free competition, not to discriminate, in the first place. The law of standing forbids what the Ninth Circuit sanctions. We turn to the law.

III. SUMMARY OF ARGUMENT

Standing is an essential part of the case-or-controversy requirement of Article III, and serves to identify disputes properly resolved by courts, as opposed to the legislature or the executive. The doctrine requires proof of (1) a concrete, particularized injury in fact; (2) a causal connection between the injury and the conduct complained of traceable to defendant's, not some third party's, action; and (3) likelihood that a favorable decision will redress the injury.

This dispute fails all three tests.

(1) Bras has no past injury, and no damage claim at all, having settled it. His "someday" intention to compete pursuant to an unidentified "someday" Pacific Bell program is ephemeral, not the predicate of actual, imminent, concrete injury. Part IV.A.

(2) There is no causal connection between Bras' (non-existent) injury and the Commission's Order, because the Order created no "barrier" against him and in fact did nothing at all to him. Pacific Bell's program, if anything, caused his injury. Pacific Bell, however, is not before the Court, Bras having settled with it. Thus Bras' only arguable injury was caused, if by anyone, by a third party not before the Court, not the Commission. Part IV.B.

(3) There is no likelihood that a favorable decision will redress Bras' injury, because it has already been redressed, Pacific Bell having paid for it. Also, Pacific Bell is not before the Court. No Order against the Commission could enjoin a party not before the Court to redress anything in any event. Part IV.C.

The Ninth Circuit's decision opens the litigation floodgates to uninjured plaintiffs, and subjects WMBE programs that hurt no one to attack in the abstract. The decision also requires courts to engage in a searching review of WMBE programs in the abstract, without any

real program before the Court to search. That search should only be undertaken in the context that two centuries of standing law require it be undertaken: The context of a concrete case or controversy involving flesh and blood people with positions based on actual fact, not speculation. Speculation is an infirm basis for adjudication, particularly in this most sensitive area. Part V.

IV. ARGUMENT

The "Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislators, to executives, and to courts." *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The doctrine of standing serves to identify those disputes which are "appropriately resolved" by courts. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The doctrine's core component "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560.

This is the classic legislative, not judicial, dispute; Bras takes issue with the wisdom and propriety of the Legislature's WMBE law and the Commission's General Order, in the abstract. There is no "concrete and particularized" injury giving rise to a real case or controversy for a court to resolve, *id.*, and could not be. Bras settled his dispute with Pacific Bell, the party that supposedly injured him, and so redressed whatever injury he had; therefore, there is nothing at all for a court to resolve.

The standing doctrine mandates that at a minimum a plaintiff must demonstrate three things: (1) "injury in fact," that is, "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical' " (*Lujan*, at 560, italics omitted); (2) a "causal connection between the injury and the conduct complained of," that is, the injury must be "traceable" to the defendant's actions, not "the

independent action of some third party not before the court," (*Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Lujan*, at 560); and (3) it is "likely," not "merely speculative," that the injury will be redressed by a favorable decision (*Simon*, 462 U.S. at 41-42; *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Lujan*, 504 U.S. at 560-61).

Bras' dispute does not come close to passing any of those tests. The Ninth Circuit's decision finding that it does, makes the tests, and therefore the standing doctrine, meaningless. *Amici* offer their views on each test. They are hopeful that, as regulated utilities subject to the Commission's jurisdiction themselves, their perspectives as to the application of the tests may be useful to the Court.

A. No Real Injury

There is no injury at all, much less a "concrete and particularized," "actual or imminent," injury here.

To start with, there is no past injury, or any damage claim whatever. Bras' damages claim was settled and dismissed. Thus Bras' claim looks to the future, only, and he sues the Commission for declaratory and injunctive relief only. Accordingly, he must show a "very significant possibility of future harm in order to have standing." *Bras II* at 873, quoting *Coral Construction v. King County*, 941 F.2d 910, 929 (9th Cir. 1991).

The Ninth Circuit found Bras had made that showing, relying upon *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 113 S. Ct. 2297 (1993) ("*Northeastern*"). The Court reasoned that under *Northeastern*:

(1) "Plaintiffs alleging equal protection violations . . . need only show that they are forced to compete on an unequal basis," *Bras II* at 873; as to that, *Northeastern* states that "[I]n the context of a challenge to a set-aside program, the 'injury in fact' is the inability to

compete on an equal footing in the bidding process, not the loss of a contract." *Northeastern*, at 2303.

(2) "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group . . . [t]he injury in fact is the denial of equal treatment resulting from the imposition of the barrier." *Id.* at 2303, quoted at *Bras II*, p. 873.

(3) Bras' undisputed inability to compete for a Pacific Bell job for three years "does not change the analysis." *Id.*

(4) Bras' "earnest[ ] desire" to compete, plus Pacific Bell's having been pleased with his past work, plus its willingness to "consider him when it reconsiders its needs" three years hence is "sufficient to establish . . . that Bras will suffer future injury if the program is not enjoined." *Id.* at 874.

Each of those propositions is wrong, inapplicable, or both.

(1) Bras' attack is not a "challenge to a set-aside program," because no program is in issue. Bras sues the Commission only. The Commission created no program and mandated none, set-aside or otherwise. Part II.A, above. Pacific Bell created a program, but even if it were a "set-aside program," Bras can't challenge it; Bras settled all of his claims with Pacific Bell, and it is not and will not be before the Court in this proceeding. To be sure, the Ninth Circuit found that "in practical effect" the Commission's General Order requires a set-aside program. But that finding has no record support whatsoever and simply demonstrates the seriousness of the court's error; the "searching review" required to determine the effect of a program can't be performed in the absence of a program to review. Part II.D, above.

(2) Government did not "erect a barrier" here. In *Northeastern*, the Government had; the City designed and

ran the program at issue there. Here the Government did neither; Pacific Bell did both.

(3) The fact Bras cannot compete for three years emphatically "change[s] the [*Northeastern*] analysis." In *Northeastern*, the members of a contractors association "regularly bid" on jobs, in the present, not sometime in the future. 113 S. Ct. at 2299, 2304. Likewise, in *Adarand*, plaintiff bid on every guardrail job in Colorado, and the jobs came up at least once a year. 115 S. Ct. at 2105.

In *Northeastern* and *Adarand*, the bidder's injury was imminent. Here it is not. To the contrary, Bras has settled with Pacific Bell and that settlement provides that Bras cannot compete for three years. Bras' intention to compete in three years in respect to an unidentified Pacific Bell job pursuant to a Pacific Bell program not in being – is a "some day" intention, with no "concrete plans" to effect it. Therefore, his intention does not support a finding of "actual or imminent injury." *Lujan*, above, 504 U.S. at 564. That is particularly so here, because Bras' "hypothetical," "conjectural," "some day," "possible" injury will supposedly be effected by "the independent action of some third party not before the court," *id.* at 560, Pacific Bell. The record does not disclose what Pacific Bell will do in response to whatever Bras does at any time, let alone in three years.

Imminence is "concededly a somewhat elastic concept," *id.* at 565, n.2, but stretched too far it breaks. The Ninth Circuit's stretch is too far.

(4) There is no evidence "sufficient to establish . . . that Bras will suffer future injury if the program is not enjoined," and it would not matter if there were. First, no one knows from the record what program, if any, Bras will compete in three years hence, much less that whatever the program is will injure him. Second, no program and no program designer are before the Court, so there is no program to enjoin in the first place.

In sum, Bras cannot bootstrap a fanciful future scenario featuring a dismissed party as principal character into a "distinct and palpable" injury. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982), quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975). At bottom, Bras simply complains that the Commission's Order is not to his liking. Therefore, his complaint is an "undifferentiated," "impermissible 'generalized grievance.' " *Lujan*, at 575, quoting *United States v. Richardson*, 418 U.S. 166, 171, 176-177 (1974). There is no injury in fact. "[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Allen*, at 754.

B. Causal Nexus

Bras attacks the General Order. The General Order, however, cannot in the nature of things directly cause Bras injury, because it does not itself do anything. The utilities, independent third parties to whom the Order applies, design programs in response to it. Accordingly, Bras' theory must be that the Order necessarily causes those independent third parties to design unlawful programs, and those programs in turn caused him injury. In other words, Bras charges that government regulation caused an independent third party to do the deed that allegedly injured him. Bras carries a heavy burden to prove that charge:

> When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well. The existence of one

> or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," [citations omitted] and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.

Lujan, at p. 562 (original italics).

Bras cannot carry that burden. First, he has no injury because he dismissed his claim in respect to that alleged injury. Part II.C, above. Second, the utility whose program allegedly caused his supposed injury is not before the court. The record does not reveal what program it now has or will have when, if ever, Bras applies to work for it again. *Id.* Third, Bras never worked for another utility, no evidence shows he ever wants to, and no evidence shows what program whatever utility he may want to work for has now or will have when he wants to work for it, if he ever does.

Fourth, Bras cannot show the General Order causes utilities to adopt discriminatory programs in any case, because it doesn't. The Order is intended to effectuate the State's policy to foster free competition, and to that end to level the playing field, not unfairly tilt it.[3] The Order

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[3] Pub. Util. Code § 8281(a): "[I]t is the declared policy of the state to aid the interests of women, minority, and disabled veteran business enterprises in order to preserve reasonable and just prices and a free competitive enterprise, to ensure that a fair proportion of the total purchases and contracts or subcontracts for commodities, supplies, technology, property, and services for regulated utilities are awarded to women, minority, and

provides for goals – targets – not requirements or quotas. Part II.A, above. The Order does not mandate or specify set asides, bid preferences or other quota mechanisms or any other means to achieve any goal. Indeed, the Order prohibits use of discriminatory quotas. Nor does the Order mandate that anyone discriminate against anyone. Instead, the Order leaves each utility free to achieve its goals in whatever way it sees fit.

Pacific Bell freely adopted a program unique to it, and *amici* and other utilities freely adopted programs unique to them. Bras claims that Pacific Bell's program hurt him, but even if it did, that claim is not before the Court. Moreover, there is no showing that whatever program Pacific Bell or anyone else freely adopts in the future will hurt him then, and none of those hypothetical programs freely adopted by those independent third parties is before the Court.

Bras, however, sues the Commission only, and attacks its Order in the abstract, only. He cannot do that. Article III requires that a federal court act "only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of *some third party not before the court.*" *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (emphasis added) (IRS ruling granted tax benefits to hospitals that offered only ER services to indigents; indigents lacked standing to attack

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disabled veteran business enterprises, and to maintain and strengthen the overall economy of the state."

Pub. Util. Code § 8283(c): "The commission shall establish guidelines for all electrical, and telephone corporations with gross annual revenues exceeding twenty-five million dollars ($25,000,000) and their commission-regulated subsidiaries and affiliates, to be utilized in establishing programs pursuant to this article."

ruling because whether hospitals would provide other services absent the ruling was "purely speculative"); *Warth v. Seldin*, 422 U.S. 490, 504-5 (1975) (town zoning ordinance required single-family homes with allegedly unreasonable requirements relating to lot size, setback, etc.; indigents alleged ordinance excluded them from town; indigents lacked standing because, among other things, whether third-party developers would build affordable housing in town absent the ordinance was speculative); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) (plaintiff must show he "sustained or is immediately in danger of sustaining some direct injury").

The *Bras II* dissent, *amici* believe, correctly sums it up:

> The majority attempts to gloss over this [causal nexus] issue by stating that "[b]ecause the Code and Order effectively encourage, if not compel, Pacific Bell to adopt discriminatory programs, there is a sufficient nexus between Bras' injury and the Commission's actions in enforcing the Code and implementing the Order." This conclusion is insupportable. The Code and Order do nothing more than to require utilities to set goals for hiring women and minority contractors. The provisions do not imply or suggest, and certainly do not compel utilities to use discriminatory programs.
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> . . .
>
> Bras is challenging the actions of the Commission. The Commission's actions are not discriminatory, and there is not a sufficient nexus between the state's provisions and any future

injury that Bras may incur from a utility's specific program.

Bras II at 878.[4]

C. Redressability

There is no likelihood that Bras' injury will be redressed by a favorable decision. First, his injury, if any, has already been redressed; Pacific Bell paid him for it. Second, the Commission is before the Court, but its Order specifies no program terms and creates no program, much less the one Bras says injured him. Third, the party who Bras said did injure him or someday will is not before the Court. Part II.C, above. Fourth, no order against the Commission could enjoin a party not before the Court from implementing whatever program it chooses to implement. *See Lujan*, above, 504 U.S. at 569 (suit against Secretary of Interior; court order would not be binding even on other governmental agencies, because "they were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced.").

"The basic inquiry, for each party seeking to invoke the authority of the federal courts [citation omitted], is

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[4] The Ninth Circuit's opinion declares without discussion that the Code and General Order "clearly have the practical effect of requiring" public utilities to adopt bidding preferences or set-asides, *Bras II*, App. at 875, but it does not. Part II.A, above. Nor does it "encourage" discrimination. *Id.* Moreover, even if it did, it "is purely speculative" whether any plan could be traced to that "encouragement or instead results from decisions" made freely by the plan's designer. Therefore, encouragement, if it existed, would not establish standing here. *Simon*, above, 426 U.S. at 42-43. *See also Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1554 (11th Cir. 1989) (a general policy that *permits but does not require* agencies to act unconstitutionally is not unconstitutional on its face).

whether that party alleges personal injury that is fairly traceable to the challenged conduct and likely to be redressed by the requested relief." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615-616 (1989), quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). The answer to the inquiry here is no. Whether Bras' "injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Asarco*, 490 U.S. at 615.

Bras' claim fails all three standing tests.

V. THE REAL INJURY

"The unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand*, above, 115 S. Ct. at 2117. The government's response here is not discriminatory on its face. Even if it were discriminatory on its face, judicial review of it must be "searching," to "ferret" out benign from malign programs. That is not an easy task. For example, some members of historically disadvantaged groups may be hurt by programs designed to help them, and preferences ought not "trammel unduly upon the opportunities of or interfere too harshly with legitimate expectations of persons in once-preferred groups." *Id.* at 2136, (Ginsberg, J., dissenting and citing Souter, J., dissenting). This Court's recent decisions reflect the difficulty of the task and indeed of defining it. Thus between them *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Adarand*, above, 115 S. Ct. 2097; *Fullilove v. Klutznick*, 448 U.S. 448 (1979); *Wygant v. Jackson Board of Education*, 476

U.S. 267 (1986); and *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) generated twenty-five separate opinions.

A court ought not and truly cannot undertake that difficult, searching review if there is nothing real before it to search. It ought not and truly cannot undertake that searching review in the abstract. Instead a court must undertake it in the context that Article III and two centuries of law require it be undertaken: The context of a concrete case or controversy involving flesh and blood people with positions based on actual facts, not speculation. The Ninth Circuit's decision forces courts to undertake a searching review in the abstract, and so calls upon them to perform an unwise, indeed impossible, act. The Constitution, and common sense, forbid that excursion.

CONCLUSION

Amici respectfully ask this Court to grant their motion for leave to file an *amici curiae* brief. In addition, *Amici* request that this Court grant the petition for certiorari by the Public Utilities Commission of the State of California.

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